BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	)	GC Docket No. 96-55

COMMENTS OF HOME BOX OFFICE, INC.

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July 15, 1996

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REPLY COMMENTS OF HOME BOX OFFICE, INC.

Home Box Office, Inc. ("HBO") hereby files these Reply Comments in the above captioned proceeding.[1] HBO requests that the Commission's revised confidentiality rules properly account for the special confidentiality needs of the highly competitive multichannel video programming distribution ("MVPD") marketplace and, most important, recognize the inherently confidential nature of programming contracts.

In this regard, HBO supports the initial Comments filed by the National Cable Television Association ("NCTA") in this proceeding.[2] NCTA was the only commenter to note that the

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[1] Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Proposed Rulemaking, GC Docket No. 96-55, FCC 96-109 (released March 25, 1996)("Notice").

[2] Comments of the National Cable Television Association, GC Docket No. 96-55 (submitted June 14, 1996).

Commission's confidentiality rules must recognize and accommodate the special needs of the MVPD marketplace. Aside from NCTA, this proceeding has been dominated by common carrier concerns -- concerns vastly different from those of the MVPD marketplace.[3] Indeed, the Commission recently has recognized that common carriers' access obligations require a heightened level of disclosure which would be "unnecessary and undesirable" in the video programming context.[4] Consistent with this finding, NCTA amply demonstrated that uniform, "one-size-fits-all" rules applicable in both the MVPD and the common carrier contexts would be entirely inappropriate.

HBO joins NCTA in requesting that the Commission designate programming contracts as documents presumptively deemed "not routinely available for public inspection" under Section 0.457(d) of the Commission's rules.[5] HBO is one of the most prolific

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[3] The Notice is replete with references to the common carrier industry and the needs for confidentiality in tariff proceedings. See, e.g., Notice at ¶¶ 23, 27, 42-45, 49, 51. By contrast, the Notice makes only a passing reference to operation of the confidentiality rules in the context of MVPD regulation. See Notice at ¶ 48.

[4] See Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Second Report And Order, CS Docket No. 96-46, FCC 96-249, ¶¶ 132, 48, n.131 (released June 3, 1996) ("OVS Order") (rejecting the arguments of some parties that OVS operators should comply with the same disclosure requirements as those established for the review of common carrier rates).

[5] See NCTA Comments at 2-5.

suppliers of programming in the MVPD marketplace, doing business with a wide variety of program distributors all across the country and abroad. As such, HBO is constantly involved in highly sensitive negotiations for the carriage of its programming. These negotiations require the exchange of proprietary and confidential information which is reflected in the rates, terms, and conditions of the final programming contract. There is a common understanding among all parties that the terms and conditions of programming agreements must be kept in the strictest confidence. Any public disclosure of information regarding the negotiation process or the terms and conditions of carriage would not only undermine HBO's ability to conduct balanced, arms-length negotiations with MVPDs, but also would seriously damage HBO's ability to compete with other programmers in negotiating with such MVPDs. It is absolutely critical to a programmer's business that its programming contracts be kept from public disclosure.

The Commission has recognized the highly sensitive nature of programming contracts and the particular need to protect them from public disclosure. In denying a prior request for disclosure of programming contracts the Commission affirmed that programming contracts between programmers and MVPDs warranted special protection:

> [D]isclosure of contracts could result in substantial competitive harm. Release of the contracts at issue would provide other carriers with key contractual provisions that they can use in tailoring competitive

> strategies. Moreover disclosure could adversely affect the subject carriers' negotiating posture with . . . distributors and might disrupt the carriers' business relationship with . . . distributors currently under contract with the carriers.[6]

Similarly, in the rate regulation context, the Commission affirmed that programming contracts were of an inherently sensitive nature, and specially admonished state and local regulators against unnecessarily requiring their disclosure. As the Commission stated:

> [T]he production of [programming contracts] would unnecessarily risk the disclosure of sensitive business information. We therefore expect local franchising authorities to be judicious in their requests for programming contracts, to make sure that such information is needed, and to narrow their requests.[7]

For these reasons, the Commission already has afforded programming contracts presumptively confidential treatment in a variety of contexts. For example, the Commission's recent OVS Order concluded that programming contracts, as a rule, should not be made available for public inspection.[8] Rather, the Commission concluded that "making carriage contracts public would stifle competition [and] divulge sensitive information."[9] Therefore,

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[6] National Rural Telephone Cooperative On Request for Inspection of Records, 5 F.C.C.R. 502, ¶ 12 (1990).

[7] May 26, 1995 Letter from Meredith J. Jones to Wesley R. Heppler and Paul Glist, 10 F.C.C.R. 9433, 9434 (1995).

[8] OVS Order at ¶ 132.

[9] Id.

the Commission ordered that production of programming contracts would only be required under limited circumstances and, when produced, would be afforded confidential treatment pursuant to Section 0.457(d).[10]

The Commission's program access rules also allow a cable operator to designate programming contracts in any submission to the Commission.[11] Designated documents are then automatically afforded confidential treatment.[12] These special provisions were adopted in express recognition of the fact that programming contracts required protection from disclosure.[13]

Thus, the Commission previously has acknowledged that programming contracts contain sensitive business information of a confidential and/or proprietary nature which should not ordinarily be disclosed to the public. The Commission is bound by that determination to find in this proceeding that programming contracts are presumed "not routinely available for public inspection" under Section 0.457(d). Indeed, the criteria the

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[10] Id. at ¶ 132, n.304.

[11] See 47 C.F.R. § 76.1003(h).

[12] 47 C.F.R. § 1003(h)(2) (while the documents may be disclosed to other parties to the proceeding in accordance with discovery procedures, the designation affords strict protection from disclosure to outside parties)

[13] See Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 F.C.C.R. 3359, ¶ 78, n.103 (1993).

Commission has used to determine what documents should be presumed confidential under Section 0.457(d) virtually replicate the Commission's characterizations of programming contracts. As the Commission has stated, "Materials which contain trade secrets, or which contain commercial, financial or technical data which would customarily be guarded from competitors ... will not ordinarily be made available for inspection."[14] This policy was created directly pursuant to Exemption 4 of the Freedom of Information Act ("FOIA") which bars any Commission disclosure of trade secrets or commercial, financial information unless pursuant to a "persuasive showing" which warrants disclosure.[15] As noted above, the Commission already has concluded that programming contracts contain this type of confidential commercial and financial information.[16] Thus, including

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[14] Amendment of Part 0, Rules and Regulations, To Implement P.L. 89-487, 8 F.C.C.2d 908, 924 (1967). See also 47 C.F.R. § 0.457(d).

[15] See Notice at ¶ 17; Chrysler v. Brown, 441 U.S. 281 (1979) (Exemption 4 and 18 U.S.C. § 1905 are "coextensive," and Section 1905 prohibits the disclosure of trade secrets, financial or commercial information unless release is authorized by a federal statute other than the FOIA). See also 47 C.F.R. § 0.457(c)(5) (prohibiting any unauthorized disclosure of documents protected by Section 1905); 47 C.F.R. § 0.457(d)(2)(i) (disclosure of trade secrets or other confidential information of a commercial or financial nature is prohibited unless a persuasive showing has been made warranting disclosure).

[16] This conclusion is also consistent with federal case law interpreting the Commission's right to disclose information protected by FOIA Exemption 4 and Section 1905. Under Exemption 4, which parallels 18 U.S.C. § 1905, information is exempt from the disclosure requirements of FOIA if it is: (1) commercial or

(continued ...)

programming contracts among the specified documents presumed to warrant confidential treatment under Section 0.457(d) would merely codify, reinforce, and simplify the Commission's current policies.

(... continued)

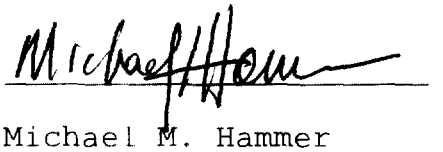
financial in nature; (2) obtained from a person; and (3) privileged or confidential in nature. 5 U.S.C. § 552(b)(4). Federal case law has held the terms "commercial" and "financial" are to be given their "ordinary meaning," and thus include information in which a submitter has a "commercial interest." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); American Airlines, Inc. v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978). In addition, the term "person," for FOIA purposes, includes entities such as programmers and MVPDs. See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 830 F.2d 278, 281, n.15 (D.C. Cir. 1987) ("For FOIA purposes a person may be a partnership, corporation, association, or public or private organization other than the agency"). Finally, information is considered confidential in nature under FOIA Exemption 4 if it is the type of information that the submitter would not customarily release to the public, or its release would be likely to impair the government's ability to obtain such information in the future. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 877-880 (D.C. Cir. 1992). As explained above, programming contracts categorically meet all these criteria.

CONCLUSION

For the foregoing reasons, HBO respectfully requests the Commission to designate programming contracts as "not routinely available for public inspection" pursuant to Section 0.457(d) of the Commission's rules.

Respectfully submitted,

HOME BOX OFFICE, INC.



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